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PROSECUTING ATTORNEYS



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Clerk of the Supreme Court
Temple of Justice
Post Office Box 40929
Olympia, Washington
98504-0929

April 30, 2013

Re: Proposed Amendment to CrR 2.3

Dear Justice of the Supreme Court:

The Washington Association of Prosecuting Attorneys (WAPA) supports amending CrR 2.3 to expressly authorize the use of newer technology. WAPA further urges this Court to make the same changes to CrRLJ 2.3 as the district court issues more after hours search warrants than does the superior court. *See, e.g.*, April 16, 2012, letter from King County Judge Ronald Kessler to police chiefs.

Recent decisions from both this Court and the United States Supreme Court will require officers to seek search warrants more frequently. Many of these search warrants will be "time sensitive" search warrants for blood samples. *See Missouri v. McNeely*, No. 11-1425 (Apr. 17, 2013) (search warrant generally required to collect a sample for a blood alcohol test). A judicial officer may read and digest a written application for a search warrant in less time and with greater comprehension than an oral application.

The current proposal, however, does not go far enough to reduce the delays and barriers faced by an officer at the roadside. While many officers have in-vehicle computers from which they may e-mail a search warrant application and proposed search warrant to a judge, the equipment does not allow an officer to affix her signature to the application. This means that the officer will either have to: (1) phone the judge to the oath administered to the officer with the officer affirming that the contents of the written application are all true and accurate; (2) print out the application, physically sign the document, scan the document, and then e-mail the scanned document to the judge; or (3) obtain a digital signature pursuant to the Washington Electronic Authentication Act, RCW 19.34 *et seq.*

The Washington Electronic Authentication Act specifically allows the Supreme Court to adopt rules that are contrary to its requirements: "Nothing in this chapter shall be

construed to limit the authority of the supreme court to adopt rules of pleading, practice, or procedure, or of the court of appeals or superior courts to adopt supplementary local rules, governing the use of electronic messages or documents, including rules governing the use of digital signatures, in judicial proceedings.” RCW 19.34.321(2).

This Court has previously used its authority to adopt rules allowing for the authentication of electronically transmitted documents without the need of a “digital signature.” *See generally* GR 30(A) (specifically recognizing that the form of signature is not limited to that set out in RCW 19.34). This Court has authorized attorneys to digitally “sign” documents – which would otherwise require a digital signature – in the following manner:

s/ John Attorney [typed, not written]
State Bar Number 12345
ABC Law Firm
123 South Fifth Avenue
Seattle, WA 98104
Telephone: (206) 123-4567
Fax: (206) 123-4567
E-mail: John.Attorney@lawfirm.com

GR 30(D)(2)(A). Even documents that the attorney must submit under penalty of perjury may be signed in this manner. *Compare* GR 30(D)(2)(B) (authorizing a similar signature on documents signed by a non-attorney when not submitted under penalty of perjury), *with* GR 30(D)(2)(C) (rules governing signatures of non-attorneys when document is under the penalty of perjury).

This Court is urged to adopt an electronic signature option for the affiant on a search warrant that will accommodate the difficulties an officer encounters in the field. WAPA suggests that the following language be incorporated into *both* CrR 2.3(c) and CrRLJ 2.3(c):

[(a) and (b) are unchanged]

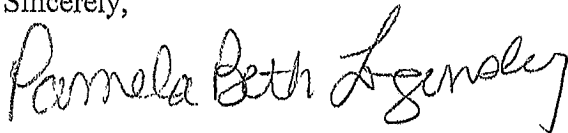
(c) Issuance and Contents. A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony may be an electronically recorded telephone statement, facsimile machine document, or electronically mailed document. A document as provided in RCW 9A.72.085 may, at the court’s discretion, be transmitted electronically to the court. For the purpose of this rule only, an electronically transmitted document may be signed by a peace officer by typing the officer’s name, badge number, title, agency, agency address, and agency telephone number in place of an actual signature, or by attaching or logically associating an image of the officer’s hand-written signature to the document. A search warrant application signed in this manner shall be deemed for all purposes as being signed under penalty of perjury. The recording or a

duplication of the recording, facsimile, or electronic mail shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court. The evidence in support of the finding of probable cause shall be preserved and shall be subject to constitutional limitations for such determinations and may be hearsay in whole or in part. If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant or direct an individual whom it authorizes for such purpose to affix the court's signature to a warrant identifying the property or person and naming or describing the person, place or thing to be searched. The court's authorization may be done by electronic mail. ~~The court shall record a summary~~ A record shall be made of any additional submitted evidence on which ~~it~~ the court relies. The warrant shall be directed to any peace officer. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person, place, or thing named for the property or person specified. It shall designate to whom it shall be returned. The warrant may be served at any time.

[(d) - (f) are unchanged]

Thank you for considering WAPA's comments.

Sincerely,

A handwritten signature in cursive script that reads "Pamela Beth Loginsky".

Pamela B. Loginsky
Staff Attorney

KING COUNTY SUPERIOR COURT

Ronald Kessler
Judge

King County Courthouse
516 Third Avenue C-203
Seattle, Washington 98104-2381
(206) 296-9113
ronald.kessler@kingcounty.gov

16 August 2012

Dear Chief:

Last year King County Superior Court adopted a rotating schedule of judges who would be available for the issuance of certain kinds of search warrants at night and on weekends. The assigned judge receives a cellular telephone. All police agencies in King County have been provided, by the King County Prosecuting Attorney, the list of the judges and the weeks assigned. If the judge is assigned to the King County Courthouse or the Youth Services Center, the telephone number is (206) 595-9289; if the judge is assigned to the Maleng Regional Justice Center, the telephone number is (206) 595-9638. While these telephones do not accept voicemail, the outgoing message refers officers and detectives to backup telephone numbers should the assigned judge not answer.

After hours warrants are for emergency out-of-county warrants, emergency pen register/trap and trace, emergency one-party consent or cavity searches only; these warrants can only be approved by a Superior Court judge. Non-emergency warrants and warrants that do not meet these criteria should be addressed by a District Court or Municipal Court judge. Superior Court judges may refuse to hear a warrant request if it either can reasonably be heard during business hours or that should be heard by a District or Municipal Court judge because it does not meet the above criteria.

In the year since this program has been implemented, we have discovered that police agencies have not implemented the technology to obtain telephonic search warrants under the procedure adopted by the Supreme Court of Washington in 1983. Criminal Rule 2.3(c) reads, in pertinent part:

A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit...or sworn testimony.... The sworn testimony may be an electronically recorded telephonic statement.... If the court finds that probable cause for the issuance of a warrant exists, it shall issue a warrant or direct an individual whom it authorizes for such purposes to affix the court's signature to a warrant....

Thus, it is necessary for the police agency requesting a warrant on the telephone to record the telephonic statement. The process should be that the judge swears the officer who states the basis for probable cause and, if the judge concurs, the judge authorizes the officer to sign the judge's name to the warrant. The recording must be preserved and made part of the court record should a criminal charge be filed.

Without an ability to record the conversation, police officers must sometimes travel long distances to get to the judge's home. While some judges have issued warrants via scanning and e-mail, this process is not specifically authorized by the court rules and thus evidence seized could be subject to suppression.

With cellular and computer technology, it should be fairly inexpensive and simple for your agency to set up a telephonic recording system from the field. Once done, warrants can be issued in minutes.

If you wish to discuss this with me, please feel free to contact me.

Sincerely,

RONALD KESSLER
Chief Criminal Judge